

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

Trinity Health-Michigan, d/b/a  
St. Joseph Mercy Oakland Hospital,

Respondent,

and

CASE: 07-CA-161375

Council 25, Michigan American  
Federation of State, County and  
Municipal Employees (AFSCME),  
AFL-CIO

Charging Party.

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**RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S  
DECISION AND RECOMMENDED ORDER**

Respondent St. Joseph Mercy Oakland Hospital ("SJMO" or "Respondent"), by its attorneys, Clark Hill PLC, and pursuant to Section 102.46 of the Board's Rules and Regulations, files the following Exceptions to the Administrative Law Judge's Decision and Recommended Order dated May 25, 2017 ("ALJD"):

**Respondent's Exceptions to the ALJ's Findings of Fact**

1. SJMO excepts to the ALJ's findings of fact that "Respondent offered to allow the pharmacy technicians to remain in the unit if the Union consented to allowing Respondent to outsource the medical transcriptionist position" as contrary to the record evidence given that the ALJ impermissibly allowed and credited inadmissible testimony regarding settlement discussions between the parties. [ALJD p. 6, lines 10-14].

2. SJMO excepts to the ALJ's findings of fact that "the evidence does not show there have been significant changes to the licensed pharmacy technicians' job duties" as contrary to the record evidence. [ALJD p. 7, lines 19-20].

3. SJMO excepts to the ALJ's findings of fact that "[Mindy Mazurek] credibly testified that as a licensed pharmacy technician her compounding duties, delivery of medications, PYXIS duties, and steps for handling narcotics inventory remained the same" as contrary to the record evidence. [ALJD p. 7, lines 25-27].

4. SJMO excepts to the ALJ's findings of fact that "Pharmacy Technicians Barbara Harrington (Harrington) and [Jennifer] Little corroborated Mazuerk's testimony that their job duties essentially remained the same after they were licensed" as contrary to the record evidence. [ALJD p. 7, lines 27-29].

5. SJMO excepts to the ALJ's findings of fact that "[Kathleen] Gaither's testimony touting the implementation of the PYXIS as a significant change in the pharmacy technicians' job duties is in direct contrast to the credible testimony of Mazurek, Little, and Harrington" as contrary to the record evidence. [ALJD p. 7, lines 29-31].

6. SJMO excepts to the ALJ's findings of fact that "Harrington provided undisputed testimony that pharmacy technicians have been required to take continuing education classes for the past 10 or 12 years" as contrary to the record evidence. [ALJD p. 7, lines 36-38].

7. SJMO excepts to the ALJ's findings of fact that while Pharmacy Technicians "are required to follow more stringent safety procedures and cleaning techniques . . . this is not a significant change in their job duties" as contrary to the record evidence. [ALJD p. 7, lines 39-41].

8. SJMO excepts to the ALJ's findings of fact that "[a] license is not required to implement stricter safety protocols for donning clothing and cleaning medical equipment for pharmacy technicians or any other healthcare worker" as contrary to the record evidence. [ALJD p. 7, lines 41-43].

9. SJMO excepts to the ALJ's findings of fact that "the evidence is undisputed that Respondent did not train the newly licensed pharmacy technicians on any alleged new responsibilities" as contrary to the record evidence. [ALJD p. 8, lines 1-2].

10. SJMO excepts to the ALJ's findings of fact and credibility determination that "[w]hile Gaither testified that the new standards requires licensed pharmacy technician to take continuing education classes, Harrington provided undisputed testimony that she has always taken continuing education classes for the position of pharmacy technician" as contrary to the record evidence. [ALJD p. 8, fn. 13].

11. SJMO excepts to the ALJ's findings of fact that "the evidence established the pharmacy technician job duties underwent minimal change after they became licensed pharmacy technicians" as contrary to the record evidence. [ALJD p. 8, lines 4-5].

12. SJMO excepts to the ALJ's findings of fact that "[e]ffective October 1, 2015, the rehired licensed pharmacy technicians were removed from the unit and Respondent ceased deducting and remitting union dues for those employees" as contrary to the record evidence. [ALJD p. 8, lines 7-8].

#### **Respondent's Exceptions to the ALJ's Legal Analysis and Conclusions of Law**

13. SJMO excepts to the ALJ's legal conclusion that statements made by the parties during settlement discussions were admissible as evidence because "the discussion at issue was: (1) part of a bargaining proposal; and (2) the testimony proffered to show when the Union had

knowledge of the alleged violation.” [ALJD p. 6, fn. 11]. This conclusion is not supported by the record evidence or by Board precedent.

14. SJMO excepts to the ALJ’s reliance on *Leach Corp.*, 312 NLRB 990, 991 (1993), quoting *NLRB v. Al Bryant, Inc.*, 711 F.2d 543, 547 (3d Cir. 1983), as the analysis and reasoning of that decision is not applicable in this case. [ALJD p. 9, lines 2-14].

15. SJMO excepts to the ALJ’s legal conclusion that “[b]ased on the facts of this complaint and well-settled case law, it is clear, that late September 2015 or October 1, 2015, is when the unfair labor practice occurred.” [ALJD p. 9, lines 6-7]. This conclusion is not supported by the record evidence or by Board precedent.

16. SJMO excepts to the ALJ’s legal conclusion that “October 1, 2015, is the date the pharmacy technicians were excluded from the bargaining unit; and the point at which Respondent discontinued deducting their union dues. The charge in this case was filed 4 days later, on October 5, 2015, well within the 6-month time period established in Section 10(b) of the Act.” [ALJD p. 9, lines 7-11]. This conclusion is not supported by the record evidence or by Board precedent.

17. SJMO excepts to the ALJ’s legal conclusion that “Respondent’s argument that the complaint at issue is untimely is without merit.” [ALJD p. 9, lines 13-14]. This conclusion is not supported by the record evidence or by Board precedent.

18. SJMO excepts to the ALJ’s reliance on *Hill-Rom Co. v. NLRB*, 957 F.2d 454, 457 (7th Cir. 1992) for the proposition that “the court acknowledged that there is only a subtle distinction between a mandatory versus permissive subject of bargaining. Based on my review of case law, it appears that often the distinction is so subtle that it is imperceptible to the Board,

courts, and litigants” as the analysis and reasoning of that decision is not applicable to the current facts. [ALJD p. 10, lines 15-18].

19. SJMO excepts to the ALJ’s legal conclusion that “Respondent’s removal of the classification of pharmacy technicians and the work performed by them is a mandatory subject of bargaining because it relates to wages, hours and other terms and conditions of employment.” [ALJD p. 11, lines 1-3]. This conclusion is not supported by the record evidence or Board precedent.

20. SJMO excepts to the ALJ’s legal conclusion that “Respondent acknowledged that reclassifying the pharmacy technician position might have an effect on their wages and benefits.” [ALJD p. 11, lines 9-10]. This conclusion is not supported by the record evidence or Board precedent.

21. SJMO excepts to the ALJ’s legal conclusion that “[c]onsequently, implementation of unilateral changes to the pharmacy technicians’ job classifications and their removal from the bargaining unit significantly impacts the union’s ability to represent its unit employees in disputes that are ‘those most essential of employee concerns – rates of pay, wages, hour and conditions of employment.’ *Arizona Portland Cement Co.*, 302 NLRB 36, 44 (1991). See also *Fry Foods, Inc.*, 241 NLRB 76, 88 (1979) (“reclassification of a position from a bargaining unit job to a nonunit job is a mandatory subject of collective bargaining if the reclassification has an impact on bargaining unit work.”).” [ALJD p. 11, lines 14-20]. This conclusion and reliance on the foregoing Board decisions is not supported by the record evidence of Board precedent.

22. SJMO excepts to the ALJ’s legal conclusion that the CBA’s recognition clause does not require Respondent to exclude the licensed pharmacy technicians from the bargaining

unit. [ALJD p. 11, lines 21-32]. This conclusion is not supported by the record evidence or Board precedent.

23. SJMO excepts to the ALJ's legal conclusion that "Respondent did not significantly alter the pharmacy technicians' duties after they became licensed." [ALJD pp. 11-12, lines 34-7]. This conclusion is not supported by the record evidence or Board precedent.

24. SJMO excepts to the ALJ's legal conclusion that it is irrelevant that the boiler operator and electrician positions were allowed to remain in the bargaining unit because they were licensed since 1965 and explicitly included in the bargaining unit by the parties when the CBA was executed in 1971. [ALJD p. 12, lines 10-15]. This conclusion is not supported by the record evidence or Board precedent.

25. SJMO excepts to the ALJ's reliance on *Bay Shipbuilding Corp.*, 263 NLRB 1133, 1140 (1982), enfd. 721 F.2d 187 (7th Cir. 1983) for the proposition that the proper focus of the analysis is "whether the duties of the licensed pharmacy technicians are sufficiently dissimilar to the bargaining unit positions." [ALJD p. 12, lines 15-26], as the analysis and reasoning of that decision is not applicable in this case.

26. SJMO excepts to the ALJ's legal conclusion that the Union did not waive its rights to bargain over the definition of the bargaining unit. [ALJD p. 13, lines 4-10]. This conclusion is not supported by the record evidence or Board precedent.

27. SJMO excepts to the ALJ's legal conclusion that Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally removing the classification of pharmacy technicians and the work performed by those employees from the bargaining unit as contrary to the record evidence and unsupported by Board precedent. [ALJD p. 13, lines 12-14].

**Respondent's Exceptions to the ALJ's Conclusions of Law**

28. SJMO excepts to Sections 1 and 2 of the ALJ's Conclusions of Law in their entirety as the ALJ's findings of facts and conclusions of law are not supported by the record evidence or Board precedent. [ALJD p. 13, lines 18-25].

**Respondent's Exceptions to the ALJ's Recommended Remedy**

29. SJMO excepts to the ALJ's proposed Remedy in its entirety, as the ALJ's findings of fact and conclusions of law are not supported by the record evidence or Board precedent. [ALJD p. 13, lines 31-40].

**Respondent's Exceptions to the ALJ's Recommended Order**

30. SJMO excepts to the ALJ's proposed Order in its entirety, as it is not supported by the record evidence or Board precedent. [ALJD pp. 14-15, all lines].

**Conclusion**

WHEREFORE, based on the reasoning and analysis as set forth in Respondent's Exceptions to the Administrative Law Judge's Decision and Recommended Order and accompanying Brief in Support of Exceptions, Respondent denies that the General Counsel is entitled to the relief sought and requests that the recommended Decision and Order be set aside.

Respectfully submitted,

By: /s/Daniel J. Bretz  
Daniel J. Bretz (P34334)  
Brian D. Shekell (P75327)  
**CLARK HILL PLC**  
Attorneys for Respondent  
St. Joseph Mercy Oakland Hospital  
500 Woodward Ave, Ste. 3500  
Detroit, MI 48226  
(313) 965-8300

Dated: July 24, 2017

**CERTIFICATE OF SERVICE**

The undersigned certifies that the forgoing document was filed with the National Labor Relations Board through the NLRB's Electronic Filing System, and served upon other counsel to this matter, as listed below, by electronic mail on July 24, 2017:

Renée McKinney  
Counsel for the General Counsel  
National Labor Relations Board , Region 7  
477 Michigan Avenue, Room 300  
Detroit, Michigan 48226  
(313) 335-8033  
Renee.McKinney@nlrb.gov

Robert Fetter  
Counsel for the Charging Party  
Miller Cohen, P.L.C.  
600 West Lafayette Blvd., 4<sup>th</sup> Floor  
Detroit, Michigan 48226  
rfetter@millercohen.com

/s/Stephen A. Holmes

**STEPHEN A. HOLMES**